



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-23/54375

PRELIMINARY RECITALS

Pursuant to a petition filed July 16, 2002, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Green County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on August 27, 2002, at Monroe, Wisconsin.

The issue for determination is the petitioner is financially eligible for MA including whether not seeking a refund of an overpayment of taxes is a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

(petitioner's rep)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Jeannie Blumer, ES Supervisor
Green County Dept Of Human Services
N3152 State Road 81
Monroe, WI 53566

ADMINISTRATIVE LAW JUDGE:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Green County.
2. The petitioner sold her interest in a farm in the spring of 2001, grossing approximately \$125,000 from that sale. The petitioner then paid for her nursing home care from her own funds in May, June, July, August, and September, 2001.
3. The petitioner applied for institutional MA on October 3, 2001. The county agency issued written notices of denial on November 28 and December 19, 2001. The bases for denial were divestment of assets, and being over the \$2,000 asset limit for part of October, 2001.

4. The agency examined checks and other transfers out of the petitioner's checking account in 2001 totaling \$69,590.25. After determining that \$7,633 of the withdrawn amounts were allowable expenses (i.e., not divestments), the agency determined that the petitioner had **divested \$61,957.25**, which resulted in ineligibility for MA payment of institutional care for 15.2 months (\$61,957.25 divided by \$4,075 monthly institutional cost = 15.2). The \$7,633 in allowable expenses consisted of \$33 in postage expense, and \$7,600 in payments to the petitioner's nursing home.
5. The checking account transfers that were included in the total \$69,590.25 "questionable transfer" figure that the agency started out with in Finding #3 were as follows: April 4, 2001, \$27,638.25 check to (xx); April 18, 2001, \$17,250.00 check to (xx and yy); April 25, 2001, \$10,000 check to (zz); May 21, 2001, \$3,000 check to (zz); and the May 24, 2001, \$11,702 check to (xx). The \$10,000 check to daughter (zz) bears the memo line notation, "gift."
6. A hearing was held before ALJ Nancy Gagnon on February 14, 2002, at Monroe, Wisconsin, on the question of whether the petitioner had divested assets in order to become eligible for MA.
7. In decision MED-23/51916, ALJ Gagnon concluded that the county agency correctly determined that the petitioner divested money to her daughters in April and May, 2001, and that the petitioner was ineligible for institutional MA at the time of her October, 2001, application, due to imposition of a divestment penalty period. The county agency was ordered to adjust its original determination that \$61,957.25 was divested, by subtracting the amounts listed in the last paragraph of the Discussion above to arrive at a new divestment penalty period for the petitioner.
8. (xx) is the petitioner's daughter and POA. As such, she is responsible for paying the petitioner's taxes.
9. In August, 2001, the petitioner's CPA provided the POA with an estimate of the state and federal taxes due for the year 2001. The POA made several payments for both federal and state income taxes based in part on the sale of the farm.
10. By early spring, 2002, the CPA completed the final tax returns for both federal and state income taxes. The federal tax was overpaid by an amount not less than \$10,221 and the state tax was overpaid by an amount no less than \$5,213.
11. The POA did not file either the federal or state tax return by April 15, 2002. Instead she got an extension. As of the date of the hearing, the POA may have just filed the tax returns.

DISCUSSION

Preliminarily, I incorporated the Findings of Fact numbers 2 through 5 (with the references to exhibits removed) from ALJ Gagnon's decision in MED-23/51916. They are my Findings numbers 2 through 5 and are included as relevant background to the issue in this case.

I. IS NOT SEEKING A REFUND OF AN OVERPAYMENT OF TAXES A DIVESTMENT

The county agency argued that the failure of the petitioner, through her POA, to file a tax return on April 15, 2002, in order to get the tax refunds was a divestment. The county also argued that the sanction period for this divestment should be used to extend the sanction period from the decision in MED-23/51916. A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; MA Handbook, Appendix 14.2.1. Divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; Handbook, App. 14.3.0. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services"). The

penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services.

The issue here is whether the petitioner's overpayment of her federal and state income taxes is a divestment. The pertinent policy provision reads as follows:

It is also divestment if a person takes an action to avoid receiving income or assets s/he is entitled to. Actions which would cause income or assets not to be received include:

1. Irrevocably waiving pension income.
2. Disclaiming an inheritance.
3. Not accepting or accessing injury settlements.
4. Diverting tort settlements into a trust or similar device.
5. Refusing to take legal action to obtain a court-ordered payment...
6. Refusing to take action to claim the statutorily required portion of a deceased spouse's or parent's estate...

See the MA Handbook, Appendix 14.2.1 (1-01-02).

In *Tannler v. Wisconsin Dept. of Social Serv.*, 211 Wis. 2d 179, 564 N.W. 2d 735 (1997), the Supreme Court upheld the Handbook provision concerning the refusal to make a claim against an estate. But at 211 Wis. 2d 186, the Court noted that there should be a certainty that the legal action will be successful.

FN8. "Action" in this statute may be interpreted to mean an affirmative act, as suggested by *Tannler*. However, consistent with other areas of the law, "action" may also be interpreted to mean an inaction or a conscious failure to act. *See, e.g., Rockweit v. Senecal*, 187 Wis.2d at 189-90, 522 N.W.2d 575 (1994) (imposing liability for failure to extinguish hot embers in a fire pit); *State v. Williquette*, 125 Wis.2d 86, 90, 370 N.W.2d 282 (Ct.App.1985) (omission may constitute aiding and abetting in the abuse of a child).

The following are examples of *actions* which could cause income or resources not to be received:

- Irrevocably waiving pension income;
- *Waiving the right to receive an inheritance*;
- Not accepting or accessing injury settlements;
- Tort settlements which are diverted by the defendant into a trust or similar device to be held for the benefit of an individual who is a plaintiff; and
- ***189** . Refusal to take legal action to obtain a court ordered payment that is not being paid, such as child support or alimony.

As the court of appeals in *Tannler* noted, the divestment portions of this legislation are designed to prevent those who, but for their divestment, are able to pay for their own medical needs. *Tannler*, 206 Wis.2d at 392, 557 N.W.2d 434. DHSS's interpretation of the term "action" to include a "refusal to take action" to claim property to which one is entitled is consistent with the purposes of the divestment provisions of this legislation.

Attorney Jaeger argues correctly that no divestment occurred because the petitioner never lost control of the tax refunds. Unlike the above examples from the MA Handbook and *Tannler*, the petitioner retained

the right to file a tax return and get the overpayment. The fact that she had not yet filed the returns did not mean she was not going to do so or refused to do so. Thus, no divestment occurred.

II. DID THE PETITIONER HAVE “AVAILABLE” ASSETS IN EXCESS OF THE \$2,000 MA ASSET LIMIT?

The flip side to the above decision is that if the petitioner did not divest the money from the refund but instead retained control of it, that resource may disqualify her from MA. The treatment of various types of assets for MA purposes is controlled by the language of the pertinent MA state and federal statutes and regulations. The financial rules for a SSI-related MA recipient are the same as the rules for the SSI program. See 42 C.F.R. §435.831(b)(2) and Wis. Stat. §49.47(4)(c).

The state MA statute declares that the MA asset limit for a single person is \$2,000 in available, nonexempt assets. Wis. Stat. §49.47(4)(b)3g. Program rules go on to explain that assets are only applied against the \$2,000 limit if they are (1) “available” and (2) nonexempt. For instance, certain assets are specifically exempted at Wis. Stat. §49.47(b)1-3 (e.g., a home, a burial trust). A retirement account is not among the assets (or resources, in federal parlance) exempted/excluded in the statute. However, this does not mean that the retirement account is necessarily an “available” asset.

The federal code and policy authorities and the state policy handbook all state that an asset that fits the three-pronged test for unavailability shall not be counted against the \$2,000 limit. The federal SSI/MA rules contain the following language on the available versus unavailable assets (resources) distinction:

§416.1201 Resources; general.

(a) *Resources; defined.* For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse)

...

20 C.F.R. §416.1201(a).

State policy provides the following definition of an available asset:

An asset is considered available when:

1. Actually available, and
2. The person has a legal interest in the liquidated sum, and
3. The person has the legal ability to make the

sum available for support and maintenance.

...
Consider an asset unavailable when:

1. It won't be available for 30 days or more, and
2. The person has documented this.

See *MA Handbook*, Appendix 11.2.0 (1-01-02).

I am sure that the petitioner would argue that it would take more than 30 days to get the refund. However, this office has only applied that exception when the applicant or recipient has actually made the effort to make a resource available for support and maintenance and the found that it would take more than 30 days. See MED-64/47753, MED-5/37336, MED-62/36499, MED-44/11103, and MED-30/94337. It is an undisputed fact that the petitioner, through her POA, made absolutely no effort to obtain the refund until possibly right near the time of the hearing. Thus, from at least the time that the tax return was completed until it was filed, the petitioner was ineligible because her assets exceeded the program limit of \$2,000.

The petitioner may believe that this will have no impact on her because of the narrow scope of the applicable MA overpayment statute. MA overpayment recovery is limited by the following statutory provision:

49.497 Recovery of incorrect medical assistance payments.

(1) The department may recover any payment made incorrectly for benefits specified under s. 49.46, 49.468 or 49.47 if the incorrect payment results from any misstatement or omission of fact by a person supplying information in an application for benefits under s. 49.46, 49.468 or 49.47. The department may also recover if a medical assistance recipient or any other person responsible for giving information on the recipient's behalf fails to report the receipt of income or assets in an amount that would have affected the recipient's eligibility for benefits. The department's right of recovery is against any medical assistance recipient to whom or on whose behalf the incorrect payment was made. The extent of recovery is limited to the amount of the benefits incorrectly granted. The county department under s. 46.215 or 46.22 or the governing body of a federally recognized American Indian tribe administering medical assistance shall begin recovery actions on behalf of the department according to rules promulgated by the department. (Emphasis added.)

I will make no judgement on whether the petitioner's situation meets the requirements in s. 49.497 as I only reviewed the petitioner's financial eligibility. I will point out that the petitioner's representatives did state at the hearing that while the county agency asked no questions about the possible refund, the petitioner's representatives said nothing about the potential refunds to the county agency. It is now up to the county agency as to whether it wants to proceed further.

CONCLUSIONS OF LAW

1. The petitioner did not divest an asset by not filing a tax return for several months.
2. The petitioner was ineligible for MA by not filing a tax return for a refund that exceeded \$2,000

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be remanded to the county agency to remove the divestment relating to the failure to file tax returns in order to collect overpayments on income taxes.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied. Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent. The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 4th day of
October, 2002

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
1014/JAN